NO. 47687-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

ANDRES SEBASTIAN FERRER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-00656-0

RESPONSE TO SUPPLEMENTAL BRIEF

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RESPONSE TO SUPPLEMENTAL ASSIGNMENTS OF ERROR

I. The trial court's instruction that defined "disfigurement" was proper because it supported by substantial evidence, allowed the parties to argue their theories of the case, and properly informed the jury of the applicable law.

SUPPLEMENTAL STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Following this Court's affirmance of Ferrer's convictions and sentence, Ferrer petitioned for review in our Supreme Court. *State v. Ferrer*, No. 47687-8-II (8/16/16). In his petition, Ferrer continued his challenge to the trial court's jury instruction that defined "disfigurement." On February 8, 2017, the Supreme Court granted review and entered an order that stated:

> That the Petition for Review is granted only as to the jury instruction regarding disfigurement and the case is remanded to the Court of Appeals Division II to address the issue on the merits. Review of all remaining issues is denied.

Appendix A (Supreme Court's Order Granting Review).

B. FACTUAL HISTORY

The State incorporates the factual history contained in the State's original Respondent's Brief. A short summary relevant to Kristina Ferrer's injuries—the substantial bodily harm that Ferrer inflicted upon her—

follows. After the attack, Kristina's head was swollen, she had headaches, bruising and bleeding in an ear, and severe bruising on her neck and the side of her head. RP 317-19, 369, 513-15. Kristina was not the only person to testify as to her injuries; instead a doctor who had observed Kristina at an Urgent Care clinic four days after the assault, a Sergeant with the Vancouver Police Department, a Detective with the Vancouver Police Department, and an officer with the Vancouver Police Department who had been a paramedic for twelve years, all testified that they personally observed injuries to Kristina's neck and ear. RP 365-67, 370-72, 434, 496-97, 499, 511-13, 523-24, 526.

The bruising on her neck developed over two and a half to three weeks and was photographed by police as it progressed. RP 320, 499-02, 513-15, 528-530. One officer explained that the bruising was unusual in its severity, another that there was significant discoloration four days after the attack, while the Sergeant testified that based on his training and experience the bruising on the neck was consistent with fingers. RP 505, 513-15, 517, 528-530. Kristina complained that she suffered from a constant headache for months. RP 321. In the approximately four weeks after the assault she also suffered from jaw and neck pain, as well as vision problems. RP 320-22. Because of her injuries and pain, Kristina took four weeks off of work. RP 320.

ARGUMENT

I. The trial court's decision to give an instruction defining "disfigurement" is supported by the law, but even if the court erred in giving the instruction the error was harmless.

Each instruction "must state the applicable law correctly." *State v. Benn*, 120 Wn.2d 631, 654, 845 P.2d 289 (1993) (citation omitted). That determination is made by evaluating each instruction "in the context of the instructions as a whole." *Id.* at 654-55 (citation omitted). Moreover, the jury instructions as a whole "are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law." *State v. Hayward*, 152 Wn.App. 632, 641, 217 P.3d 354 (2009) (quoting *State v. Barnes*, 153 Wn.2d. 378, 382, 103 P.3d 1219 (2005)).

Statutes that define terms do not create alternative means of committing a crime. *State v. Linehan*, 147 Wn.2d 638, 646-47, 56 P.3d 542 (2002) (citing *State v. Lacio*, 97 Wn.App. 759, 760-63, 987 P.2d 638 (1999) (holding that the three definitions of "great bodily harm" do not create three alternative means)). Additionally, when convicting a defendant of a crime a "jury need not be unanimous as to any of the definitions [of that crime] nor must substantial evidence support each definition." *Linehan*, 147 Wn.2d at 649-650.

"Substantial bodily harm" is defined by RCW 9A.04.110(4)(b), which states that the term:

> means bodily injury which involves a temporary but substantial *disfigurement*, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part

(emphasis added). This definition was provided to the jury as Jury Instruction No. 9. CP 46. The jury was also provided with an instruction that defined "disfigurement." CP 47. That instruction, Jury Instruction No. 10, defined "disfigurement" to mean:

> that which impairs the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner.

CP 47.

Ferrer argues that in giving the instruction defining "disfigurement"—an instruction defining one term among many in another definitional instruction—the trial court commented on the evidence[1], and diminished the State's burden of proof. He is incorrect.[2]

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[1] Ferrer did not make this argument to the trial court when he objected to the giving of the instruction. RP 706-09; Supplemental Brief of Appellant at 3-4.

[2] The State does agree, however, with Ferrer's conclusion that the *specific* challenge he made to Instruction No. 10 in the trial court was preserved, i.e., that the instruction lowered the State's burden of proof, and can be reviewed by this court. Supp.Br. of App. at 3-4, 6-7.

a. The "disfigurement" instruction is approved by case law and remains good law.

In *State v. Atkinson*, the defendant was convicted of Assault in the Second Degree for intentionally assaulting the victim and thereby recklessly inflicting substantial bodily harm upon her. 113 Wn.App 661, 666-67, 54 P.3d 702 (2002). The victim "was scraped and bruised, her eyes were black and blue, and the white of one eye had blood inside it." *Id.* at 666.

The *Atkinson* trial court instructed the jury by providing the same definition of "disfigurement" as the trial court did in this case. *Compare Id.* at 667 *with* CP 47. The source of the "definition of 'disfigurement' that the court used is the definition given in the former BLACKS LAW DICTIONARY 420 (5th ed.1979), and the definition acknowledged in *State v. Hill*, 48 Wn.App. 344, 347, 739 P.2d 707 (1987)."[3] *Id.* at 667. Nonetheless, the defendant in *Atkinson* argued that the provided definition was "overly broad," and that it "misstated the law and misled the jury." *Id.* Moreover, just as Ferrer essentially does here[4], the defendant argued that "he could not argue his theory of the case because the court's instructions effectively eliminated the distinction between second degree assault and fourth degree assault." *Id.*

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[3] *Hill* noted that other jurisdictions have approved of the same definition of disfigurement. 48 Wn.App. at 347 (citing cases).
[4] Supp. Br. of App. At 9-10.

The *Atkinson* court, however, rejected those arguments and concluded the definition given in the instruction was "was accurate and merely supplemented and clarified the statutory language" and that "[the defendant] was still able to argue his theory of the case, which was that he was only guilty of fourth degree assault by showing the disfigurement was *not substantial*." *Id.* at 668 (emphasis added). This holding remains good law as *Atkinson* has not been overruled, cited disapprovingly, nor superseded as Ferrer claims. Supp. Br. of App. at 8. Instead, as Ferrer notes, *Atkinson* is cited approvingly by a Comment in WPIC 2.03.01 Substantial Bodily Harm – Definition (2016), which notes "[t]he jury may be further instructed on the meaning of 'disfigurement' using the definition from Black's Law Dictionary. *State v. Atkinson*, 113 Wn.App. 661, 667–68, 54 P.3d 702 (2002)."

Additionally, the legal question moved from whether bruising constitutes disfigurement[5] and how to define to disfigurement to whether bruising constitutes *substantial* disfigurement, and what definition, if any, should be given for the term "substantial." Thus, in *State v. McKague*, our Supreme Court held that the term "substantial" as used in the "substantial bodily harm" alternative of Assault in the Second Degree:

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[5] *See State v. Hovig*, 149 Wn.App. 1, 5, 13, 202 P.3d 318, *review denied*, 166 Wn.2d 1020, 217 P.3d 335 (2009) (red and violet teeth marks lasting up to two weeks constituted substantial bodily injury); *State v. Ashcraft*, 71 Wn.App. 444, 455, 859 P.2d 60 (1993) (bruises from being hit by shoe were temporary but substantial disfigurement).

> signifies a degree of harm that is considerable and necessarily requires a showing greater than an injury merely having some existence. While we do not limit the meaning of "substantial" to any particular dictionary definition, we approve of the definition cited by the dissent below: "considerable in amount, value, or worth"

172 Wn.2d 802, 806, 262 P.3d 1225 (2011) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (2002)). Applying that definition, *McKague* held that the victim's injuries, "facial bruising and swelling lasting several days, and the lacerations to his face, the back of his head, and his arm were severe enough to allow the jury to find that the injuries constituted substantial but temporary disfigurement." *Id.*[6]

Accordingly, if the State attempts to convict a defendant of an Assault in the Second Degree based on evidence of a victim's bruising it must show that the bruising constitutes "temporary *but substantial disfigurement*." RCW 9A.04.110(4)(b) (emphasis added). The requirement that any disfigurement based on bruising be substantial prevents any proper definition of disfigurement from diminishing the State's burden of proof by effectively eliminating the distinction Assault in the Second Degree and Assault in the Fourth Degree.

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[6] *McKague* also held that victim's concussion, "which caused him such dizziness that he was unable to stand for a time, was sufficient to allow the jury to find that he had suffered a temporary but substantial impairment of a body part or an organ's function." *Id.*

Ferrer argues, on the other hand, that *Atkinson* should "not be followed because it pre-dated this Court's decision in *State v. Dolan*[.]"[7] Supp. Br. of App. at 16-17. *Dolan*, however, was issued not even a year later than *Atkinson* and did not address the proper definition of disfigurement nor did it even mention *Atkinson*. Instead, *Dolan* disapproved of an instruction that stated the following:

> The presence of bruising and swelling *can be* sufficient evidence of substantial bodily harm. The bruising and swelling *can* constitute temporary but substantial disfigurement.

118 Wn.App. at 331 (emphasis added). This instruction, unlike the disfigurement instruction at issue here, was not definitional, but instead constituted an improper comment since it could be construed to mean "that evidence showing bruising and swelling also shows substantial bodily harm." *Id.* at 332. Thus, *Dolan* does not provide any reason for this Court to depart from *Atkinson*, while the doctrine of horizontal stare decisis strongly supports the claim that *Atkinson* remains good law and should be followed. *See In re Arnold*, --- Wn.App. ----, --- P.3d ----, 2017 WL 1483993 (discussing the application of horizontal stare decisis amongst the divisions of the state Courts of Appeal).

[7] 118 Wn.App. 323, 73 P.3d 1011 (2003).

As a result, the trial court's instruction to the jury defining "disfigurement" was proper and supported by the law.

b. Ferrer argues new theories not presented to the trial court as to why the "disfigurement" should not have been given. These theories are waived.

Ferrer now claims the "disfigurement" instruction should not have been given because it constituted a "judicial comment on the evidence" and violated the provisions of the United States Constitution and Washington Constitution pertaining to due process and equal protection. Supp. Br. of App. at 5, 12-17. Ferrer did not make these arguments to the trial court; instead he argued "[d]isfigurement is something that is in the common understanding of people . . . I believe that it may actually lower the burden of – of proof." RP 706-09. Because these new theories were not presented to the trial court, this Court should not review them.

"If an objection naming a specific, but untenable, ground be overruled, it cannot upon appeal be made to rest upon another ground which, although tenable, was not called to the attention of the court during the trial." *State v. Pappas*, 195 Wn. 197, 200, 80 P.2d 770 (1938). This rule articulated by our Supreme Court in 1938 continues undisturbed into the present day. *See e.g., State v Saunders*, 132 Wn.App. 592, 132 P.3d 743 (2006); *State v. Price*, 126 Wn.App. 617, 109 P.3d 27 (2005); *State v. Mathes*, 47 Wn.App. 863, 737 P.2d 700 (1987). In essence, a defendant

who makes a strategic decision about what arguments to make at the trial level, at some later point, after losing and obtaining new counsel might wish he or she would have made a different argument, but that does not relieve the defendant of the consequences of the initial decision. Thus, Ferrer having chosen to argue against the giving of the "disfigurement" instruction for two reasons cannot later be heard to argue new and different reasons when and because the particular strategy he adopted was unsuccessful. Notably, Ferrer did not advance *these* arguments in his SAG, but for the first time in a Supplemental Petition for Review.

RAP 2.5(a)(3) provides an exception to the general rule and allows an appellant to raise for the first time a "manifest error affecting a constitutional right." *State v. Torres*, --- Wn.App. ----, ---- P.3d ----, 2017 WL 1900551 recently discussed what it means for an error to be manifest:

> Washington courts and even decisions internally have announced differing formulations for "manifest error." First, a manifest error is one "truly of constitutional magnitude." *State v. Scott*, 110 Wn.2d at 688 (1988). Second, perhaps perverting the term "manifest," some decisions emphasize prejudice, not obviousness. The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error *actually* affected the defendant's rights. It is this showing of actual prejudice that makes the error "manifest," allowing appellate review. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009); *State v. Scott*, 110 Wn.2d at 688; *State v. Lynn*, 67 Wn. App. 339, 346, 835 P.2d 251 (1992). A third and important formulation for purposes of this appeal is the facts necessary to adjudicate the claimed error must be in

> the record on appeal. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest. *State v. Riley*, 121 Wn.2d at 31.

at 5 (emphasis added). Ferrer cannot show that the errors of which he now complains are manifest.

First, and most straightforwardly, Ferrer cannot show how, in the context of the trial, the alleged error—the giving of the "disfigurement" instruction—*actually* affected his rights. He does not contest the sufficiency of the evidence as it pertains to the substantial bodily harm suffered by the victim or argue actual prejudice; instead he speculates that the jury could have applied the instruction in some discriminatory fashion based on race or gender. Supp. Br. of App. at 12-16. This speculation is insufficient to satisfy RAP 2.5(a)(3).

Second, if the facts necessary to adjudicate the claimed error are in the record on appeal, Ferrer does not identify them or connect them to this claimed error. As such, "no actual prejudice is shown and the error is not manifest. *Torres*, 2017 WL 1900551 at 5 (citing *Riley*, 121 Wn.2d at 31). Ferrer argues:

> Jurors raised in a culture that values white female beauty will more likely find that a particular bruise impairs the beauty of a woman of Western European descent with the stereotypical appearance of a model from *Cosmopolitan*

> than the situation where a male, from a non-Western European background, receives the same bruise. And while this calculus devalues the "beauty" of non-European males, the result is actually oppressive towards the white women whose "beauty" is put on a pedestal.

Supp. Br. of App. at 13. What this means in the context of *this* trial is entirely unclear. The record is bereft of any mention of the culture in which the jurors were raised. In fact, the current record on appeal appears devoid of any information on the jury. Furthermore, Ferrer does not show where in the record on appeal it could be determined that Kristina is a "woman of Western European descent with the stereotypical appearance of a model from *Cosmopolitan*" such that the instruction "would have . . . encouraged jurors to convict Mr. Ferrer." Supp. Br. of App. at 13-14. The new arguments that Ferrer makes are not manifest.

c. *Any error was harmless because there was overwhelming evidence that Ferrer inflicted substantial bodily harm upon Kristina because she suffered both a temporary but substantial loss or impairment of the function of any bodily part or organ and a temporary but substantial disfigurement.*

Even if the disfigurement instruction was given error any such error is harmless, whether under the non-constitutional standard or the constitutional standard.

Here, the State established through multiple witnesses, to include the police and a doctor, that in the days after the assault Kristina had

severe or significant bruising to the neck and bruising or swelling to her ear. Moreover, pictures were admitted showing the same and Kristina testified to duration (weeks) that the bruising remained. This evidence established a temporary but *substantial* disfigurement and is clearly sufficient under the case law, *supra. Hovig*, 149 Wn.App. at, 5; *Ashcraft*, 71 Wn.App. at 455.

Furthermore, the Urgent Care doctor that saw Kristina four days after the assault testified that Kristina was complaining of "headache, dizziness, neck pain and seeing spots" and that these symptoms were "worsening." RP 369-70. Kristina's testimony elaborated on the extent and duration of these symptoms, remarking as it pertained to the headache that it was constant and lasted for months. RP 317-328. This evidence established a temporary but *substantial* loss or impairment of the function of any bodily part or organ, here her brain and/or eyes, and is sufficient under the case law. *McKague* ,172 Wn.2d at 806.

Though when convicting a defendant of a crime a "jury need not be unanimous as to any of the definitions [of that crime] nor must substantial evidence support each definition," here substantial evidence supported two of the definitions of "substantial bodily harm." *Linehan*, 147 Wn.2d at 649-650. Thus, even if there was error related to the "disfigurement" instruction, the error is harmless since there was sufficient and substantial

evidence to sustain Ferrer's conviction since Kristina suffered substantial bodily harm under another definition.

CONCLUSION

For the foregoing reasons this Court should affirm Defendant's conviction for Assault in the Second Degree.

DATED this 17 day of May, 2017.

Respectfully submitted:

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Appendix A

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ANDRES S. FERRER, Petitioner.	)	No. 93634-0 **ORDER** Court of Appeals No. 47687-8-II

Department II of the Court, composed of Chief Justice Fairhurst and Justices Madsen, Stephens, González and Yu, considered at its February 7, 2017, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is granted only as to the jury instruction regarding disfigurement and the case is remanded to the Court of Appeals Division II to address the issue on the merits. Review of all remaining issues is denied.

DATED at Olympia, Washington, this 8th day of February, 2017.

For the Court

Fairhurst, C.J.

CHIEF JUSTICE

CLARK COUNTY PROSECUTING ATTORNEY

May 17, 2017 - 3:54 PM

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